him to carry out his work as the lorry attendant of a lorry engaged in obtaining a load of sand from a sand-pit and transporting the loaded lorry to another place. Furthermore, on the facts there was not only no defect in the system provided but also, on the appellant's own admission, the accident would not have occurred had he adhered to the system provided. The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Director of Legal Aid; Donaldson & Burkinshaw.*

MUNUSAMY v. SUBRAMANIAM & ORS.

[O.C.J. (Abdul Hamid J.) April 17, 1969]

[Seremban — Originating Summons No. 1 of 1969]

Practice and Procedure — Habeas Corpus — Application by originating summons — Whether High Court has power to issue writ of the nature of habeas corpus — Courts of Judicature Act, 1964, s. 25 — Criminal Procedure Code (Cap. 6), s. 365 and Chapter XXXVI — Constitution of Malaysia, art. 5(2).

In this case the applicant had applied by originating summons for an order or writ of *habeas corpus* to be issued for the production of the body of one Rajammah. The first and third defendants brought a motion for an order that the application be struck out. It was argued that the application was wrongly brought by originating summons and that the application should have been made under Chapter XXXVI of the Criminal Procedure Code (Cap. 6).

Held, dismissing the application: (1) the power to issue directions, orders or writs including writs of the nature of *habeas corpus* for the enforcement of any of the rights conferred by Part II of the Constitution of Malaysia are specifically provided as an additional power for the High Court under section 25 of the Courts of Judicature Act, 1964, but such power must be exercised in accordance with any written law or rules of court relating to the same;

(2) the only written law relating to directions of the nature of *habeas corpus* is to be found in Part XXXVI of the Criminal Procedure Code and therefore the proper procedure in this case would be for the applicant to apply under section 365 of the Criminal Procedure Code and not by the *ex parte* originating summons in chambers.

Cases referred to:—

(1) *District Magistrate, Trivandrum* v. *Mappillai & Ors* A.I.R. 1939 Mad. 120.

(2) *Matthen & Ors.* v. *District Magistrate, Trivandrum* L.R. 66 I.A. 222; A.I.R. 1939 P.C. 213.

MOTION.

Gurdial Bakan Singh for the applicant.

N. Ramachandran for the respondents.

Cur. Adv. Vult.

Abdul Hamid J.: This is a motion by the 1st and 3rd respondents asking for an order that the whole of the application for an order that a writ of *habeas corpus* be issued requiring the body of Murugammah Rajammah alias Rajammah d/o Arumugam to be brought by her mother Karthaie or her brother Subramaniam s/o Arumugam, or her father Arumugam, or her brother Shanmugam s/o Arumugam, or any other member of their family, or by their servants or agents before the judge in chambers and set at liberty (to enable her to choose a person of her own choice as her husband), be struck out on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious and an abuse of the process of the court.

At the hearing of this motion, counsel for the respondents raised an issue which to my mind is of some considerable importance, i.e. whether the application for the writ can be proceeded with by way of originating summons, in the absence of any provision governing the same in the Rules of the Supreme Court and also in view of the legislative provisions under Chapter XXXVI of the Criminal Procedure Code (Cap. 6).

Counsel for the applicant concedes that there is no provision in the Rules of the Supreme Court governing applications of this nature, however, he argued that by virtue of Order 72 rule 2 application may be made by way of originating summons. He further submitted that in view of article 5(2) of the Federal Constitution, the court has jurisdiction to hear the application.

Counsel for the respondents submitted that section 365 of the Criminal Procedure Code is somewhat similar to section 491 of the Indian Criminal Procedure Code, and the application may perhaps be properly made under this section. He further submitted that the provisions of the English common law as exercised by the King's Bench Division of the High Court of Justice in England do not apply. He cited the following cases to support his argument: (a) *District Magistrate, Trivandrum* v. *Mappillai & Ors.*[1] (b) *Matthen & Ors.* v. *District Magistrate, Trivandrum.*[2]

In *District Magistrate, Trivandrum* v. *Mappilla & Ors.*, the matter referred for consideration of the Full Bench was whether the High Court or any judge of it can issue a common law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code. It was held in that case that:—

"By Acts of the Legislature lawfully passed in 1875 and subsequent years the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Criminal Procedure Code. Hence, the High Court or any judge of it cannot issue the common law writ of *habeas corpus* in any of the cases covered by section 491 of the Criminal Procedure Code."

In delivering the judgment of the Full Bench, Leach C.J. traced the history, relating to the powers of the High Court back to 1861 when Parliament passed an Act authorising the establishment of High Courts of Judicature in India by Letters Patent under the Great Seal of the United Kingdom, to erect and establish High Courts at Fort William in Bengal, Madras and Bombay for the respective Presidencies. In 1875 the Criminal Procedure Code made provision empowering the High Courts to issue directions of the nature of a *habeas corpus*.

The judgment of the Full Bench was affirmed in *Matthen & Ors.* v. *District Magistrate, Trivandrum,* where the facts were that:—

"Warrants issued against the appellants, subjects of Travancore, resident in Madras, by the British Resident in Travancore for the Madras States under section 7 of the Indian Extradition Act, 1903, to the Chief Presidency Magistrate of Madras, stated that the appellants stood charged with offences punishable under specified sections of the Travancore Penal Code and corresponding sections of the Indian Penal Code committed in the Travancore State, and directed the Chief Presidency Magistrate to apprehend them and surrender them to the frontier police of the Travancore State for production before the District Magistrate, Trivandrum. The appellants were arrested in Madras on the instructions of the Chief Presidency Magistrate. On a petition to a single judge of the High Court for the issue of a writ of *habeas corpus*, the judge directed the issue of the writ."

It was held by the Judicial Committee of the Privy Council that:—

"In a case such as the present the power to issue a common law writ of *habeas corpus* in British India has been taken away by legislation, and the powers conferred by section 491 of the Criminal Procedure Code, which provides that any High Court may direct that a person illegally or improperly detained should be set at liberty, substituted."

Whatever may have been the position in India, it is necessary for me to examine the position in Malaya in order to determine the powers of the High Court or any judge of it to issue a writ of *habeas corpus*.

Originally, powers akin to the powers vested in a High Court were vested in the Court of a Judicial Commissioner and these powers were provided in the Enactments of various Malay States. The Courts Enactments of the States of Pahang, Perak, Selangor and Negri Sembilan were repealed by the Courts Enactment No. 14 of 1918, enacted by the Rulers of the Federated Malay States. Under the Courts Enactment, 1918 the Court of a Judicial Commissioner was still retained with essentially the same powers as were vested under the various States Enactments. The Courts Enactment, 1918 was replaced by the Courts Enactment (Cap. 2) effective from 1st January, 1919. It provided for the establishment of the Supreme Court comprising of the Court of Appeal and Court of a Judge. Under section 49 of the Courts Enactment (Cap. 2) the original civil jurisdiction of the High Court includes, within the Federated Malay States, jurisdiction and authority as was exercised in England by the Chancery and King's Bench Division of the High Court of Justice. It seems to me that at least in the Federated Malay States the High Court, in exercise of its civil jurisdiction under the Courts Enactment (Cap. 2), had, presumably, jurisdiction and authority as the King's Bench Division of the High Court of Justice in England had to issue common law writs of *habeas corpus*. In 1946, under the Malayan Union Government, the Courts Ordinance, 1946 was enacted establishing the constitution and powers of the civil and criminal courts with substantially the same powers as were formerly exercised in the territories included in the Malayan Union. With the establishment of a Federation under the 1948 Federation of Malaya Agreement, the Courts Ordinance, 1948 was passed which consolidated the law relating to the constitution and powers of the civil and criminal courts throughout the Federation. The Unfederated Malay States Courts Enactments, including the F.M.S. Courts Enactment (Cap. 2), were repealed. Under section 47 of the Courts Ordinance, 1948, the original civil jurisdiction of the High Court was substantially the same as that provided under F.M.S. Courts Enactment (Cap. 2). In 1964, however, the Courts of Judicature Act was passed. Provision for the original criminal jurisdiction (section 22), original civil jurisdiction (section 23) and other powers of the High Court (section 25) was made. In particular sub-section (2) of section 25 conferred on the High Court powers as set out in the First Schedule of the Act. It includes power —

"To issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of any of of the rights conferred by Part II of the Constitution, or any of them, or for any purpose".

It would appear, therefore, that the civil powers of the High Court were provided either under section 23 or section 25 of the Act. With the partial repeal of the 1948 Ordinance it is also apparent that the Legislature has omitted the provisions relating to jurisdiction and authority of like nature and extent as exercised by the Chancery and King's Bench Division of the High Court of Justice in England. Powers to issue directions, orders or writs including writs of the nature of *habeas corpus* for the enforcement of any of the rights conferred by Part II of the Constitution are now specifically provided as additional powers for the High Court. Part II of the Constitution sets out provisions relating to fundamental liberties including the liberty of the person under article 5. Clause

(2) of article 5 is relevant for the purposes under consideration. It reads:—

"Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

The power to issue directions, orders, or writs of the nature of *habeas corpus* for the enforcements of any of the rights under Part II is however subject to the proviso contained in sub-section (2) of section 25 of the Act, which provides that:—

"All such powers shall be exercised in accordance with any written law or Rules of Court relating to the same."

The only written law relating to directions of the nature of *habeas corpus* can be found under Part XXXVI of the F.M.S. Criminal Procedure Code. Section 365 of the Criminal Procedure Code provides powers to the court of a judge to direct that any person who is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation is to be set at liberty. Under Chapter XXXVI provisions governing applications, affidavits, warrants, service of warrants and appeals were also made. Whatever may have been the position before the Courts of Judicature Act 1964 came into effect, it seems to me that by reason of section 25 of the Act the additional powers of the High Court as set out in the First Schedule must be exercised only in accordance with any written law relating to the same, and Chapter XXXVI of the Criminal Procedure Code, being provision relating to directions in the nature of *habeas corpus*, would apply.

The application for a writ of *habeas corpus* in the present case relates, I think, to a matter which is covered by section 365 of the Criminal Procedure Code, and in view of section 25 of the Courts of Judicature Act, I am of the opinion that the proper procedure would be for the applicant to apply under section 365 and not by way of *ex-parte* originating summons in chambers.

For these reasons I allow the motion.

By consent of parties no order as to costs.

Motion allowed.

Solicitors: *Gurdial Bakan Singh; N. Ramachandran.*

GAN REALTY SDN. BHD. & ORS. v. NICHOLAS & ORS.

[O.C.J. (Raja Azlan Shah J.) April 22, 1969]
[K.L. — Civil Suit No. 828 of 1968]

Specific Relief — Injunction — Application to dissolve ex parte injunction — Agreement for sale of shares not available in open market — Specific performance — Specific Relief (Malay States) Ordinance, 1950, s. 20.

Contract — Shares — Sale of — Specific performance.

This was an application to dissolve the *ex parte* injunction granted to the plaintiffs restraining the defendants from parting with their shares in the the Oriental Bank of Malaya Berhad the 6th defendant. The facts were that the first five defendants were the directors of the 6th defendant bank and they had agreed to sell their respective shares in the bank to the plaintiffs. The plaintiffs claimed specific performance and an injunction. It was argued for the applicants that the agreement was incapable of specific performance and therefore an interim injunction would not lie.

Held, dismissing the application: (1) in order to dissolve or vary an *ex parte* injunction the defendants must satisfy the court that the facts upon which the injunction was granted no longer exist or that it was obtained by misrepresentation or suppression of material facts;

(2) in this case the shares of the bank were not available in the open market and the court could therefore order specific performance of an agreement for the sale of the shares and in this respect the defendants had not established that the circumstances had changed;

(3) there was a delay in filing the application to set aside the *ex parte* injunction and the court would in the circumstances refuse to exercise its discretion in favour of the applicants.

Cases referred to:—

(1) *Duncuft* v. *Albrecht* 59 E.R. 1104.

(2) *Re Schwabacher, Stern* v. *Schwabacher, Koritschoner's Claim* (1908), 98 L.T. 127.

CIVIL SUIT.

K.S. Chung for the plaintiffs.

R.R. Chelliah (*P.S. Moorthy* with him) for the defendants.

Raja Azlan Shah J.: This is an application to dissolve the *ex parte* injunction dated 7th June, 1968 granted by Gill J. (as he then was) to the plaintiffs (a) restraining the 1st, 2nd, 3rd, 4th and 5th defendants from parting with or disposing of any of their shares in the Oriental Bank of Malaya Berhad, the 6th defendant, (b) restraining the 6th defendant from registering the transfer of any of the said shares to any persons other than to the plaintiffs. The *ex parte* injunction was granted before the writ or the statement of claim or any proceedings was served on any of the defendants.

The first five defendants are currently the directors of the said bank. On 4th May, 1968 they negotiated with the plaintiffs concerning